SUPREME COURT, U. S.

AUG 19 1970

ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

426

AETNA CASUALTY AND SURETY COMPANY,
Petitioner,

vs.

PACIFIC EMPLOYERS INSURANCE COMPANY
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE INLAND PRESS, DETROIT, MICHIGAN

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Respondent, Pacific Employers Insurance Company, in response to the Petition For A Writ Of Certiorari adopts the references shown in the Petition (1), (2) and (3) as Appendix A, B, and C and for the purpose of this response adds thereto:

4) The Plaintiff's Complaint, Appendix D.

5) The Defendant's Answer as Appendix E.

6) The Motion for Summary Judgment of the Pacific Employers Insurance Company and the Affidavits in support thereof as Appendix F.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Response will be limited to grounds as set forth by Petitioner and questions presented for review and Statutes for construction, but denies a jurisdictional issue is involved.

COUNTER STATEMENT OF THE CASE

On March 14, 1968 a Declaratory Judgment action was brought by Pacific Employers Insurance Company against the Aetna Casualty & Surety Company, the surviving widows and children of Geoffrey C. Scarratt and Clair W. Curry and the regular employers of Mr. Scarratt and Mr. Curry, Jebbco corporation and the Jim Robbins Company respectively.

The Complaint sets forth:

> "5. That the Defendants, Sheila Scarratt, Andrew Scarratt, Paul Scarratt, Christie Scarratt and Vicky Scarratt and Adelene H. Curry, are nominal defendants, who are indirectly involved in the controversy only to the extent that they are entitled to benefits of the Workmen's Compensation Law of the State of Michigan from either the Plaintiff, Pacific Employers Insurance Company or the Aetna Casualty & Surety Company."
>
> (D 8b)

Only counsel for the Pacific Employers Insurance Company and Aetna Casualty & Surety Company participated in the controversy.

On July 26, 1968, Aetna Casualty & Surety Company filed a Motion for a Summary Judgment of Dismissal but failed to follow Rule 56-E.

On August 12, 1968 Pacific Employers Insurance Company filed a Motion For a Summary Judgment duly supported by Affidavits in accordance with the Rule. (F 28b). The District Court denied the Motion For Summary Judgment of the Aetna Casualty and Surety Company on November 6, 1968. The Aetna Casualty and Surety Company filed a second Motion For Summary Judgment on June 11, 1969, but again failed to comply with the requirements of Rule 56-E.

On August 14, 1968 the Honorable Talbot Smith, United States District Judge, rendered an Opinion (A 1b) and in accordance therewith on September 18, 1969 an Order For Summary Judgment was entered by the Court. With the entry of the Summary Judgment for the Plaintiff, the Defendants' motion fell by the wayside.

For the reasons given in the Opinion of the District Judge the ruling was:

> "Under the facts before us, the companies should share an equal burden." (A 6b)

Both parties took an Appeal from the Decision of the District Court. The relief sought by Pacific Employers Insurance Company was as follows:

> "Wherefore, Plaintiff-Appellee and Cross-Appellant, Pacific Employers Insurance Company, prays that the Summary Judgment for Declaratory Relief be affirmed subject to modification by an Order deleting the Jim Robbins Company as an insured under the Pacific Employers Insurance Company policy, or in the alternative that the Summary Judgment entered by the Honorable Talbot Smith, Trial Judge, be affirmed."

In a Per Curiam Order, the Court of Appeals stated:

> "District Judge Talbot Smith held that each Company is liable to the extent of fifty per cent of liability to the extent ultimately established by the administrative determination by the cognizant administrative officials of the State of Michigan. Both companies appeal.
>
> We conclude that the District Judge arrived at as satisfactory a solution as possible under the facts in this case." (B 7b)

Both parties asked for a Re-hearing.

On its application for a Re-hearing, Pacific Employers Insurance Company based its contention solely on the classifications and premiums of the two policies issued

simultaneously. The Aetna Casualty and Surety Company classification of Operations was limited solely to aircraft operations and an estimated premium based thereon. (D 8b)

The Pacific Employers Insurance Company's policy Classifications had no provisions whatever for Aviation Risks and no estimated premiums. (D 8b)

The Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court by entering a Per Curiam Order. Both parties to the appeal sought a re-hearing and both parties were denied a re-hearing. Aetna Casualty and Surety Company now seeks a writ of certiorari to review the determination of the Court of Appeals.

The problems involved in this situation came about because of the issuance of two policies of Workmen's Compensation liability insurance and the filing of declarations of insurance coverage with the Michigan Workmens' Compensation Department by two insurance carriers for one employer, the Jim Robbins Company, for the same period July 1, 1966 to July 1, 1967. The basis for two policies being issued is self evident by reference to the classification of risks assumed under each contract by the two insurers heretofore referred to.

The Michigan Workmens' Compensation Act requires that an insurance company insure all of an employer's workmen's compensation obligation, thus, the sharing of an employer's workmen's compensation obligation by insurance companies is prohibited; Workmen's Compensation Act, Part IV, Section 1, Michigan Compiled Laws 1948 § 414.1, MSA § 17.195. Notwithstanding the knowledge, actual or constructive of this Statute by the Agent and the two companies, the policies before the Court for construction were written simultaneously.

On September 26, 1966, while the policies of Pacific Employers Insurance Company and Aetna Casualty and Surety Company purporting to provide workmen's compensation coverage to Jim Robbins Company were in effect, the policy of Pacific Employers Insurance Company also granting workmen's compensation coverage to Jim Robbins Seat Belt Company, Jebbco Corporation, Robbins Land Company and Robbins Realty Company, there was an airplane crash in Platte, South Dakota. This crash occurred shortly after take off from an airfield in the Flying R. Ranch. It involved an airplane owned by Jim Robbins Company and it took the lives of Jim Robbins, Geoffrey C. Scarratt, Clair W. Curry and two others not involved in this action.

Jim Robbins was the President of the Jim Robbins Company, Geoffrey C. Scarratt was the Plant Manager of Jebbco Corporation and Clair W. Curry was the Superintendent of Maintenance of Jim Robbins Company. The Flying R Ranch, on the date of the crash, was owned by the Robbins Land Company and had as a part of its facilities an airfield where, shortly prior to the crash, Mr. Scarratt and Mr. Curry were doing manual labor.

Following the deaths of Scarratt and Curry, plaintiff, Pacific Employers Insurance Company voluntarily commenced paying Workmens' Compensation death benefits to the widows of Scarratt and Curry, so that the defendants would suffer no financial hardship during the Appeal. However, there never was any question as to Curry's dependents being entitled to Workmen's Compensation benefits from the insurer of Jim Robbins Company.

Aetna Casualty and Surety Company in answering the Complaint admitting the issuance of its policy of workmen's compensation insurance to the Jim Robbins Company for the period July 1, 1966 to July 1, 1967 and contending that

the Policy was issued because of a mistake of law of one Henry Hollister, an agent common to both plaintiff and Aetna Casualty and Surety Company but no where in the proceedings is there anything to support this conclusion but the assumption set forth in the pleadings of counsel for the Aetna Casualty and Surety Company. (E 22b)

The record is barren of any proof that there was a mistake of law in the issuance of the two contracts by the common agent but on the contrary, the policies, one including only aviation risks and the other covering all risks but aviation speak for themselves.

The District Court in his Opinion recognized the law with reference to mutual mistake but concluded:

> "The parties clearly intended exactly what was sought to be accomplished. Pacific wanted to insure the Jim Robbins Company for everything except liability arising from the use of aircraft. Aetna wanted to insure Jim Robbins Company for aircraft liability only. * * *" (A 4b)

ARGUMENT

THE COURT OF APPEALS HAS IGNORED DECISIONS OF THIS COURT DEALING WITH WHETHER THERE IS JURISDICTION TO GRANT DECLARATORY RELIEF OR WHETHER DECLARATORY JUDGMENT JURISDICTION SHOULD BE EXERCISED AND HAS DECIDED THIS CASE CONTRARY TO DECISIONS OF THIS COURT.

"At the outset it is pertinent to state that when two insurance companies issue policies where only one is allowed, a seemingly reasonable solution of the problem is to order both to share losses equally. However, this would only be an apparently reasonably solution, for it gives no consideration to whether a Federal Court has or should

exercise jurisdiction, and, should there be jurisdiction, gives no consideration as to whether there are unresolved fact issues that, if resolved, would allow for a manifestly different result."

The fallacy of Petitioner's argument is clearly disclosed. In the Declaratory Judgment action it is stated:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any Court in the United States upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration whether or nor further relief is or could be sought * * * .28 USC, 2201."

Counsel supports Respondent's position on page 12 of his Brief, which states:

> "When it will take a determination from a Michigan administrative agency that the death of Mr. Scarratt or Mr. Curry occurred while he was acting in the employ of the Jim Robbins Company, and the circumstances indicate that such a decision may never come about it would seem that presently it is doubtful that there is a case or controversy between Pacific Employers Insurance Company and Aetna Casualty and Surety Company.
>
> It is plain from the recent decisions of this Court that if there is a case or controversy, declaratory judgment jurisdiction will be exercised by Federal Courts only if the issues are fit for judicial decision AND there would be a hardship to the parties by withholding Jurisdiction. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), *Toilet Goods Ass'n.* v. *Gardner*, 387 U.S. 158 (1967), *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, (1967), *Golden v. Zwickler*, 394, U.S. 103 (1969)."

In the instant case there is no question but that the dependents of Clair W. Curry was entitled to compensation

benefits from the compensation insurer of the Jim Robbins Company. See page 7 of Petitioner's Statement of Facts wherein it is stated:

> "* * * Clair W. Curry was the Superintendent of Maintenance of Jim Robbins Company * * *"

Although by repetition, it is to be recalled that in paragraph 5 of Plaintiff's Complaint and Defendant's Answer, it was set forth that the dependents of the deceased employees were nominal defendants only. However, in addition to the compensation benefits due Curry; and Scarratt if found to be a loaned employees, there is the issue of "who is the insurer."; and the requirement of reimbursement of benefits already paid.

That in the Affidavit of G. Cameron Buchanan filed in support of the Motion for Summary Judgment by Pacific Employers Insurance Company, it was stated:

> "That the controversy would extend between the two insurers and that the other parties were nominal parties and that under no circumstances would the dependents of the deceased persons be obligated to incur any legal expense.
>
> Affiant further states that E. R. Whinham, Jr. in accordance with the agreement of his employer, Fern Duvall, made at the same time, agreed that in the event The Aetna Casualty & Surety Company was held to be the insurer that the Pacific Employers Insurance Company would be relieved of any obligation."
>
> (D 8b)

In the further Affidavit of Richard J. Copeland filed in support of the Motion For Summary Judgment of Pacific Employers Insurance Company, Mr. Copeland stated:

> "That without an adjudication Pacific Employers Insurance Company voluntarily agreed to pay Workmen's Compensation benefits.

> That Fern Duvall, Supervisor of the Workmen's Compensation Division of The Aetna Casualty & Surety Company for and on behalf of that Company agreed with affiant that if subsequent litigation disclosed that the obligation of payment of Workmen's Compensation to the dependents of Scarratt and Curry was that of the Aetna Casualty & Surety Company that that Company would assume future payments and reimburse the Pacific Employers Insurance Company for payments made to date.
>
> Affiant further states that Fern Duvall stated to affiant in the presence of others that he and his Company were well aware of the classification disclosed on the contract issued by the Aetna Casualty & Surety Company, the limitations attempted to be placed thereon, and further that the Pacific Employers Insurance Company has issued simultaneously with the issuance of the Aetna Casualty & Surety Company policy a Workmen's Compensation policy covering all risks other than those pertaining to aviation accidents." (D 8b)

Necessarily it must be submitted that no statement from the record can justify the claim that no actual controversy existed.

THE COURT OF APPEALS HAS ALLOWED A SUMMARY JUDGMENT TO STAND WHERE THERE ARE YET UNRESOLVED ISSUES OF FACT REGARDING A REMEDY AFFIRMATIVELY SOUGHT BY A DEFENDANT THAT IS AVAILABLE UNDER APPLICABLE STATE LAW, THUS SANCTIONING A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

While Respondent agrees that Michigan clearly allows for reformation because of mistake of law or a mutual mistake that the policy written does not express the actual or real agreement of the parties for the reasons heretofore

disclosed it is uncontradicted and not worthy of argument but that the parties clearly intended exactly what was sought to be accomplished with the issuance simultaneously of the two contracts.

Petitioner is in error when reciting that there is a remedy that is available under applicable State Law.

The decision of the District Court or the Sixth Circuit Court on Appeal was necessary to permit the Referee of the Workmen's Compensation Department to enter a lawful opinion as to the liability of the Defendant insurer or insurers.

In *Michigan Mutual Liability Company* vs. *Baker*, 295 Michigan, 237, 294 NW 168, one of three compensation carriers filed a Bill In Equity asking for cancellation of its insurance policy. The facts disclosed that State Accident Fund had issued a policy and filed a Certificate, October 21, 1937 and filed notice of termination on October 31, 1938. Employers Mutual Liability Company issued a policy effective October 21, 1938. Michigan Mutual Liability Insurance Company issued a policy effective October 24th, 1938. All Companies had certificates on file. Before the cancellation of any of the three policies could become effective an employee on October 29, 1938 was fatally injured. Thus all three companies were on the risk on the day of the occurrence.

The Deputy Commissioner held that the State Accident Fund was the insurer. Michigan Mutual Liability Insurance Company pending an appeal filed its Bill seeking cancellation.

Two questions were raised by the Appeal and a decision limited to answering them:

(1) Is the jurisdiction to determine the validity

of an insurer's certificate vested in the department of labor and industry, or in a court of equity?

(2) Has plaintiff an adequate remedy without the intervention of a court of equity?

We think the question of the cancellation of the insurer's certificate on the ground of fraud or mistake may be determined in a court of equity. It is within the province of equity to cancel instruments which may annoy and harass until their invalidity is determined. *Fred Macey Co.* v. *Macey*, 143 Mich. 138 (5 LRA NS. 1036).

'Equity has jurisdiction where complete protection and relief requires the cancellation of written instruments, the recission of a transaction, or other specific *relief of equitable character.' Haylor* v. *Grigg-Hanna Lumber & Box Co.*, 287 Mich. 127, 133.

Furthermore, because of the nature of the contract and the fact that the tribunal which acts thereon is one of limited powers, plaintiff would have no remedy at all in the premises unless a court of chancery intervenes. While the department has jurisdiction to determine "all questions" (2 Comp. Laws 1929 §8455 (Stat. Ann. § 17.190) arising under the compensation law, it must be borne in mind that it is an administrative tribunal only and not a court possessing general equitable and legal powers. *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8.

'While the industrial accident board * performs quasi-judicial duties, it is not possessed of judicial power' *Jones* v. *St. Joseph Iron Works*, 212 Mich. 174, 178."

(Emphasis mine)

Page 243 it is stated:

"We think, also, that the question of mistake in the issuance of an insurer's certificate is to be determined by a court of equity and not by the department, and that the intervention of equity is necessary for adequate protection of the rights of an insurer."

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS ALLOWED A SUMMARY JUDGMENT TO STAND BASED UPON THE DISTRICT COURTS CONCLUSION AS TO THE INTENT OF THE PARTIES WHEN THE AFFIDAVITS IN SUPPORT OF SUMMARY JUDGMENT AND THE DOCUMENTS IN EVIDENCE ALLOW FOR MORE THAN ONE INFERENCE AND THERE IS NO OATH BEARING EVIDENCE FROM THE PERSON WHOSE INTENT IS CRITICAL, THE AGENT COMMON TO BOTH INSURERS.

Counsel for the Petitioner to make the assertions found on page 15 and 16, must, indeed, have neglected to read the language of Richard J. Copeland, Supervisor of the Workmen's Compensation Division of the Pacific Employers Insurance Company filed in support of his Company's Motion For Summary Judgment, reading as follows:

> "That Fern Duvall, Supervisor of the Workmen's Compensation Division of The Aetna Casualty & Surety Company for and on behalf of that Company agreed with affiant that if subsequent litigation disclosed that the obligation of payment of Workmen's Compensation to the dependents of Scarratt and Curry was that of the Aetna Casualty & Surety Company that that Company would assume future payments and reimburse the Pacific Employers Insurance Company for payments made to date.
>
> Affiant further states that Fern Duvall stated to affiant in the presence of others that he and his Company were well aware of the classification disclosed on the contract issued by the Aetna Casualty & Surety Company, the limitations attempted to be placed thereon, and further that the Pacific Employers Insurance Company has issued simultaneously with the issuance of the Aetna Casualty &

Surety Company policy a Workmen's Compensation policy covering all risks other than those pertaining to aviation accidents."

While reference is made to issues of fact unresolved and a Summary Judgment being granted notwithstanding the outstanding questions, a careful search of every paragraph in the record and Briefs in the District Court and Court of Appeals fails to disclose any single question of fact which should have prevented the decisions granting the Declaratory Judgment.

The record discloses:

A. That the policies of the two Companies were issued simultaneously with the knowledge of the two companies and the Agent representing both carriers. (F 28b)

B. That the intent of the carriers was disclosed by the premiums to be charged evidenced by the classifications which became a part of the insurance contracts. (D 8b)

C. The affidavit of Richard J. Copeland discloses the controversy. (F 28b)

D. The Affidavit of Richard J. Copeland shows the knowledge of the Petitioner to the knowledge of the companies as to the classification attempted to be in the nature of limitations and the simultaneous issuance of the contracts of insurance. (F 28b)

While Petitioner crys forth that the one person whose intent was critical, the Agent common to both insurers, had yet to utter one word under oath, the record is barren of any attempt on Petitioner's part if the Agent would have changed the decision of the Court, to produce the witness, place him upon the stand, or file an affidavit by the individual in support of the Motions For Summary Judgments by the Aetna Casualty & Surety Company which were filed without supporting affidavits pursuant to Rule 56-E.

We need but refer to *Michigan Liability Insurance Company* vs. *Baker*, supra, to see that the Workmen's Compensation Board could not make a final adjudication without the intervention of a Judgment of a Court in equity.

WHEREFORE, Respondent prays that this Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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Dated: August 4, 1970.

APPENDIX A
OPINION

(Filed August 14, 1968)

At a session of said Court held in Detroit, Michigan on the 14th day of August, 1969.

Present: Honorable Talbot Smith, United States District Judge.

This is an action for declaratory judgment pursuant to Section 2201, Title 28, United States Code, in which Plaintiff, Pacific Employers Insurance Company (hereinafter referred to as Pacific), seeks a determination by this Court as to its possible liability as a Workmen's Compensation Insurance carrier under the terms of a policy issued to the Jim Robbins Company by plaintiff.

The problem before this Court arose because of the simultaneous issuance of insurance policies by plaintiff and defendant Aetna Casualty & Surety Company (hereinafter referred to as Aetna) to the Jim Robbins Company. Both policies were issued by Henry Hollister who acted as agent for both Aetna and Pacific. Although both parties admit that such dual coverage is contrary to Michigan law,*1 plaintiff alleges that the situation arose because Pacific refused to insure risks arising out of the operation of aircraft while Aetna would insure only such risks. Defendant Aetna argues that a mistake of law caused agent Hollister to issue the simultaneous policies and seeks reformation of its policy.

In September, 1966, Jim Robbins and two alleged employees, Geoffrey Scarratt and Clair Curry, were killed in an airplane accident in South Dakota. Plaintiff requests

*1 Workmen's Compensation Act, Part IV, Comp. Laws §§414.1-414.11, Mich. Stat. Ann. §17.195.

that with respect to any liability arising out of this accident that the Court find:

a) that Aetna is solely liable for any damages found to be owing to the dependents of Scarratt and Curry pursuant to the Workmen's Compensation Act;

b) that Pacific be held not liable for the damages by virtue of the expressed agreement of the parties, or

c) in the alternative, that the Court find pursuant to the Michigan Workmen's Compensation Act, Part IV, Sections 414.1 through 414.11 that Pacific and Aetna have dual coverage and are equally responsible for any liability determined by the Workmen's Compensation Board.

Both companies moved for summary judgment. Motions for Summary Judgment filed by Aetna were heard and denied on October 14, 1968 and July 7, 1969.

The present motion for summary judgment was filed by Pacific and after oral argument and extensive briefing, was taken under advisement by the Court.

Aetna opposes the present motion on several grounds, but places its major reliance upon its position that there are two issues of fact to be litigated:

1) whether or not the deceased employees were in the course of their employment at the time of their deaths, and

2) whether the policies were issued as a result of a mistake of law on the part of the agent Hollister.

1) Whether or not the deceased employees were in the course of their employment at the time of their deaths?

We find the first ground asserted by Aetna to be entirely without merit and irrelevant to this cause. There is no dispute that an airplane accident occurred on September 26, 1966, and that in said accident Clair W. Curry and Geoffrey Scarratt sustained fatal injuries, and that Mr.

Curry and Mr. Scarratt left dependents. The questions of whether the accident was within the ambit of decedent's employment, whether the decedents were in fact acting in an employment relationship with the Jim Robbins Company, whether the dependents are entitled to compensation and in what amount, are all matters to be decided by the Workmen's Compensation Board and are *solely* within the jurisdiction of that Board. Workmen's Compensation Act, 12A Mich. Stat. Ann. §17.180, §6, Part III.

In addition, Aetna argues that a determination by this Court on the issues raised herein will prejudice the rights of the decedent's survivors in that they are seeking to enforce claims which are based upon the absence of any employment relationship between the decedents and the Jim Robbins Company. It is possible that a decision as to employment relationship will prejudice the rights of decedents' survivors. However, that decision will be made by the Workmen's Compensation Board and not by this Court. This Court will decide *only* which of two insurance companies is liable *in the event that liability is found to exist.* The conditions of liability must be found by the Board. It should also be noted that although decedents' survivors are represented by Counsel in this matter, the argument about possible prejudice to their rights was raised solely by Aetna.

2) Whether the policies were issued as a result of a mistake of law on the part of the agent Henry Hollister?

Aetna argues that Hollister, acting as agent for both it and Pacific, made a mistake of law in that he believed that separate policies of Workmen's Compensation insurance could be issued to separate divisions of the same corporation. Aetna alleges in its Answer to Plaintiff's complaint

(unsupported by Affidavit) that Hollister had formerly handled the insurance by Aetna for a company known as Commander Aviation, Inc. When that company was transferred to the Jim Robbins Company, Hollister believed, Aetna alleges (Answer, pp. 3-4, §12, 13) that it was proper to issue a separate policy covering the operation formerly known as Commander Aviation.

It is Pacific's position that the policies were issued as a result of the refusal of Aetna to assume liability for any claims arising out of the operation of aircraft and that consequently, the issuance of the policies clearly represented the intent of the parties involved.

Based upon its argument that a mutual mistake of law was made by the Agent, Aetna seeks a reformation of its policy. There are several difficulties with this position, however.

Reformation of an insurance policy may be had, in general, where by reason of fraud, inequitable conduct, or mutual mistake, the policy as written does not express the actual and real agreement of the parties. See, e.g. *Michigan Mut. Liability Co.* v. *Baker*, 295 Mich. 237, 284 N.W. 168 (1940); *Health Delivery Service* v. *Michigan Mut. Liability Co.*, 257 Mich. 472, 241 N.W. 168 (1932). In the situation before this Court, the policies as issued *do* express the intent of the parties, the only difficulty being that this is not a permissible intent under Michigan law. The parties clearly intended exactly what was sought to be accomplished. Pacific wanted to insure the Jim Robbins Company for everything except liability arising from the use of aircraft. Aetna wanted to insure Jim Robbins Company for aircraft liability only. It is obvious that in a normal situation, such limitation of risk would be

proper. However, in Michigan, a workmen's compensation insurance carrier, by statutory mandate, assu[illegible]s *all* obligations imposed upon the employer by his acceptance of the Michigan Workmen's Compensation law as far as the payment of compensation, death benefits, or for medical or hospital care, are concerned. Workmen's Compensation Act, Part IV, Section 1 (e), Comp. L. 1948 §414.1(e), Mich. Stat. Ann. §17.195(e), and any attempt to vary these terms of its statutory contract of coverage or to limit its liability by provisions inconsistent with the Act are null and void. Part IV, Sec. 3, CL. 1948 §414.3, Mich. Stat. Ann. §17.197.

Secondly, assuming an innocent mistake on the part of Hollister, how could one or both of these contracts be reformed? The intent of the parties was obviously to limit liability to certain risks. This may not be done under the Workmen's Compensation Act and it is this Act, rather than the intent of the parties, which is binding upon this Court. *New Amsterdam Casualty Co.* v. *Moss*, 312 Mich. 459, 20 N.W. 2d 272 (1945). No amount of reformation could solve the conflict between the expressed intent of these parties and the provisions of the Workmen's Compensation Act.

There is no doubt that under the provisions of the Act itself, the portions of the policies here involved which purport to limit liability to certain risks, while excluding it as to other risks, are void and unenforceable. M.S.A. §17.197. The plaintiff candidly admits that independently of the agreement of the insurers and their agent—which agreement we find to be void—either company would be liable for any loss resulting from injuries suffered by an employee in the scope of his employment for the Jim Robbins Company.

In its prayer for relief, Pacific asks:

> "C. In the alternative, that this Honorable Court find pursuant to the Michigan Workmen's Compensation Act, Part IV, Sections 414.1 through 414.11 that the Pacific Employers Insurance Company and the Aetna Casualty & Surety Company have dual coverage on the loss and are equally responsible to the heirs of Geoffrey G. Scarratt and Clair W. Curry for losses pursuant to the terms of the Workmen's Compensation Law", Complaint, p. 6.

Under the facts and circumstances of this case, we find this remedy to be most appropriate.

The equities presented to this Court do not indicate that one or the other insurance company is entitled to have its contract of insurance reformed so as to free it from liability in view of the fact that the policies were issued by a common agent in accordance with the intentions of the parties, however mistaken that agent was as to the law involved.

The contracts cannot be reformed so as to make them conform with Michigan law without placing an undue burden on one of the companies involved.[2] Under the facts before us, the companies should share an equal burden.

The plaintiff's Motion for Summary Judgment is granted.

Plaintiff is directed to file a suitable Order consistent with this Opinion within twenty (20) days.

Talbot Smith,
United States District Judge.

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[2] Since both companies filed an acceptance of risk with the Department of Compensation, we are not presented with the situation of *Burhans v. Central States Produce Corporation*, 313 Mich. 124, 20 N.W. 2d 835 (1945) in which the Court placed liability on the insurance company which filed the acceptance.

APPENDIX B.

(Title of Court and Cause)

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This is a declaratory judgment action involving the liability of two insurance companies under the Michigan Workmen's Compensation law. Both companies were represented by the same agent. In violation of the Michigan statute, this agent wrote policies with both companies providing workmen compensation insurance for Jim Robbins Company as insured. *One policy provided for aviation coverage and the other did not list aviation activities.* Both policies were issued the same day and for the same period of time.

While both policies were in effect two employees were killed in the crash of an airplane owned by Jim Robbins Company and piloted by Mr. Robbins. *The widows of both of the victims claimed workmen's compensation benefits.* Each company denied liability and contends that the other is liable. However, Pacific Employers Insurance Company began paying compensation to the two widows promptly after the death of their husbands, under an agreement of reimbursement after ultimate determination of liability.

District Judge Talbot Smith held that each company is liable to the extent of fifty per cent of liability to the extent ultimately established by the administrative determination by the cognizant administrative officials of the State of Michigan. Both companies appeal.

We conclude that the District Judge arrived at as satisfactory a solution as possible under the facts in this case.

The judgment of the District Court is affirmed. Each party will pay its own costs on appeal.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX C.

(Title of Court and Cause)

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judge.

Upon consideration, it is ORDERED that the petitions for rehearing filed by Pacific Employers Insurance Company and Aetna Casualty & Surety Company be and hereby are denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX D

DECLARATORY JUDGMENT ACTION ON BEHALF OF THE PACIFIC EMPLOYERS INSURANCE COMPANY, A CALIFORNIA CORPORATION.

(Filed May 13, 1968)

Now comes the Plaintiff, Pacific Employers Insurance Company, a California Corporation, by Alexander, Buchanan & Conklin, and complains against the Defendants, The Aetna Casualty & Surety Company, a Connecticut Corporation; Jim Robbins Company, a Michigan Corporation; Jebbco Corporation, a Michigan Corporation, Sheila Scarratt, Andrew Scarratt, Paul Scarratt, Chistie Scarratt, Vicky Scarratt and Adelene H. Curry and complains as follows:

1. That the Plaintiff, Pacific Employers Insurance Com-

pany, is a citizen of the State of California; a corporation organized and existing under the laws of the State of California and licensed to do business in Michigan.

2. That the Defendant, Aetna Casualty & Surety Company is a citizen of the State of Connecticut, a corporation organized and existing under the laws of the State of Connecticut and licensed to do business in Michigan.

3. That the Defendart, Jim Robbins Company, is a Michigan Corporation organized and existing under the laws of the State of Michigan.

4. That the Defendant, Jebbco Corporation, is a Michigan Corporation organized and existing under the laws of the State of Michigan.

5. That the Defendants, Sheila Searratt, Andrew Searratt, Paul Searratt, Christie Searratt and Vicky Searratt, and Adelene H. Curry, are nominal defendants, who are indirectly involved in the controversy only to the extent that they are entitled to the benefits of the Workmen's Compensation Law of the State of Michigan from either the Plaintiff, Pacific Employers' Insurance Company or the Aetna Casualty & Surety Company.

All parties in the litigation are in agreement that the defendants named in the foregoing paragraph should not and need not incur any expense in this litigation; that they need not appear; that their rights will not be jeopardized; that following judgment in this cause they will receive full benefits under the Workmen's Compensation Law to which they are entitled from either or both of the insurers as the form of the Judgment of the Court discloses and that pending such Judgment the Plaintiff will advance the Workmen's Compensation benefits due pursuant to the provisions of the Act.

6. That more than Ten Thousand ($10,000.00) Dollars

exclusive of interest and costs is involved in this controversy and the jurisdiction of the Court is based on diversity of citizenship of the parties.

7. That this is an action for Declaratory Judgment pursuant to Section 28, United States Code, paragraph 2201, for the purpose of determining a question of actual controversy between the Pacific Employers Insurance Company, the Aetna Casualty & Surety Company, Jebbco Corporation, Jim Robbins Company, as hereinafter more fully appears and the parties are without adequate relief without a decision by this Court of the controversy herein presented.

8. That on September 26, 1966 an airplane crash occurred in the area north of Platte, South Dakota, and as a result thereof Geoffrey Curzon Scarratt, husband of Sheila Scarratt and father of Andrew, Paul, Christie and Vicky Scarratt, and Clair W. Curry, husband of Adelene H. Curry, sustained fatal injuries.

9. That effective July 1, 1966, Aetna Casualty & Surety Company issued a Workmen's Compensation policy to Jim Robbins Company being numbered 96C-2004 as a renewal of its prior policy effective July 1, 1965 to July 1, 1966.

10. That notwithstanding the provisions of the Michigan Workmen's Compensation Act, Part IV, Sections 414.4-414.14, the Aetna Casualty & Surety Company issued a Workmen's Compensation policy #96C-2004 to Jim Robbins Company effective July 1, 1966 and expiring July 1, 1967 limiting the compensation risk to coverage under Extensions Schedule attached hereto and marked Exhibits "A", "B" and "C".

11. That simultaneously with the issuance of the Aetna

Policy #96C 2004 the Pacific Employers Insurance Company issued a Workmen's Compensation policy #PE C 111136 to Jim Robbins Company and others for the period from July 1, 1966 to July 1, 1967 and scheduled the classification of operations covered as evidence by Exhibit "D".

12. That the two policies issued and dated on the same date for the same period naming the defendant, Jim Robbins Company as the insured were issued setting forth the different classifications covered by each insurer because the Pacific Employers Insurance Company would only write a Workmen's Compensation contract assuming losses exclusive of the risks arising out of the operation of aircraft and the Aetna Casualty & Surety Company would only write a Workmen's Compensation contract limiting its obligations to losses occurring out of the operation of aircraft.

13. That the two policies with the schedule of classifications were issued; the Pacific Employers Insurance Company policy omitting in its classification of coverage accidents arising out of the operation of aircraft and the Aetna Casualty & Surety Company issued its contract covering only the classification of accidents arising out of the operation of aircraft. That said policies were issued in the form and manner aforesaid by virtue of an express agreement and with the intent of the insurers to limit their obligation under their respective policies to the respective classifications named.

14. That Clair W. Curry was an employee of Jim Robbins Company in the capacity of Superintendent of Maintenance.

15. That Geoffrey C. Scarratt was the Plant Manager of Jebbco Corporation.

16. That on September 24, 1966 the Jebbco Corporation loaned the services of Geoffrey G. Scarratt to Jim Robbins Company and to carry out services to be rendered the said Geoffrey G. Scarratt accompanied Jim Robbins, President of the Jim Robbins Company, in the aircraft owned and operated by the Jim Robbins Company of the Flying-R Ranch near Platte, South Dakota.

17. That while Clair W. Curry and Geoffrey G. Scarratt were at the Flying-R Ranch, they were engaged at the request of Jim Robbins Company in supervising the runway construction; clearing the surface of debris; working on fuel tanks; and a parking ramp for the benefit of the Jim Robbins Company and aircraft of customers of the Jim Robbins Company.

18. That on the return trip from South Dakota to Detroit, Michigan, shortly after take-off the crash aforementioned occurred with the resulting death of Scarratt, Curry, and others.

19. That notwithstanding any payments heretofore made by the Pacific Employers Insurance Company, in error, reimbursement of the same from the Aetna Casualty & Surety Company is waived and the claim of the plaintiff herein is limited to the controversy involving the obligation to the dependents of Geoffrey G. Scarratt and Clair W. Curry and the parties who incurred the burial expense.

Wherefore with the Pacific Employers Insurance Company seeking no damages for any prior losses against the Aetna Casualty & Surety Company prior to the accident in question of September 26, 1966, and further that the individual defendants would incur no loss but receive Workmen's Compensation benefits in accordance with the terms of the Workmen's Compensation Law in the form of the Judgment of this Court.

Wherefore, Pacific Employers Insurance Company prays that this Honorable Court enter a Declaratory Judgment providing the following:

A. That the Aetna Casualty & Surety Company be found liable for damages to the dependents of Geoffrey G. Searratt and Clair W. Curry pursuant to the terms of the Workmen's Compensation Act by reason of the language of the express agreement of the parties and the intent of the parties with the simultaneous issue of the two contracts in the two companies effective July 1, 1966.

B. That the Pacific Employers Insurance Company be held not liable to the dependents of Geoffrey G. Searratt and Clair W. Curry by virtue of the express agreement and the intention of the parties as disclosed by the specific language of the contract of insurance issued simultaneously with the Aetna Casualty & Surety Company and excluding losses or damages arising out of the operation of aircraft, or

C. In the alternative that this Honorable Court find pursuant to the Michigan Workmen's Compensation Act, Part IV, Sections 414.1 through 414.11 that the Pacific Employers Insurance Company and the Aetna Casualty & Surety Company have dual coverage on the loss and are equally responsible to the heirs of Geoffrey G. Searratt and Clair W. Curry for losses pursuant to the terms of the Workmen's Compensation Law.

Alexander, Buchanan & Conklin
By: G. Cameron Buchanan
Attorneys for Plaintiff
2217 First National Building
Detroit, Michigan 48226

Dated: March 14, 1968.

EXHIBIT A

Workmen's Compensation and Employers' Liability Policy

ALL STATES ENDORSEMENT

A. In the event the Insured undertakes operations in any state not designated in item 3 of the declarations, other than Nevada, North Dakota, Ohio, Washington, West Virginia or Wyoming, the Company agrees as follows:

1. To reimburse the Insured for all compensation and other benefits required of the Insured under the workmen's compensation or occupational disease law of such state.
2. Such insurance as is afforded by the policy under Coverage B also applies to bodily injury by accident or disease, including death at any time resulting therefrom, sustained by any employee of the Insured arising out of and in the course of his employment in operations in such state or in operations necessary or incidental thereto.
3. Such insurance as is afforded by the policy by virtue of this endorsement does not apply to such operations if the Insured has, under any workmen's compensation or occupational disease law, other insurance for such operations or is a qualified self-insurer therefor, or has affirmatively rejected the workmen's compensation or occupational disease law applicable to such operations.

B. The agreements in Paragraph A foregoing are subject to the following conditions.

1. The Insured shall give notice to the Company before or within a reasonable time after the commencement of such operations, but failure to give

such notice shall not invalidate the insurance afforded by the endorsement.

2. The Insured shall, if requested by the Company, take whatever action is necessary to bring himself within the workmen's compensation and occupational disease laws of such state with respect to such operations. The Company shall thereupon issue, in the form required by such laws, and the Insured shall accept workmen's compensation coverage under such laws, and such insurance as is afforded by this endorsement with respect to such operations shall thereupon terminate.
3. The premium bases and rates for the classifications of operations in such state or operations necessary or incidental thereto shall be those which would have been applicable under the manuals in use by the Company had Coverage A of the policy applied to such operations and the premium for the insurance afforded by this endorsement shall be computed accordingly, subject to the provisions of Conditions 1 of the policy.
4. The word "State" as used in this endorsement means any State of the United States of America and the District of Columbia.

C. Such insurance as is afforded by the policy by virtue of this endorsement shall not apply:

1. To injury or to death of the master or a member of the crew of any vessel; or
2. To fines or penalties imposed on the Insured for failure to comply with the requirements of any workmen's compensation law.

D. The insurance afforded by the policy by virtue of this

endorsement shall not constitute workmen's compensation insurance as required of an employer under the laws of any state.

E. All of the provision of the policy, except Coverage A of Insuring Agreement I and Conditions 7 and 15, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective

Policy No. 96C 2004

Endorsement No.

Named Insured Jim Robbins Co.

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

John A. Hill
President

Countersigned Henry Hollister
Authorized Agent

EXHIBIT B
ADDITIONAL SECURITY—DIRECT PAYMENT BY REINSURERS

The Company is a Member of the Casualty Section of the United States Aircraft Insurance Group and, in accordance with the terms of the Agreement among the Members of said Section, the risk assumed by the Company under this policy is reinsured by all of the other Members of said Section. For the benefit of and as additional security for the Insured, the said Agreement provides that the other members have assumed, in the event of the insolvency of the Company, the obligations of the Company under this policy as their direct obligations to the payees hereunder and in substitution for the obligations of the Company to such payees. The Insured, by the acceptance of this policy, agrees to such assumption and substitution.

F-131A

This endorsement forms a part of the policy to which attached effective from its date of issue unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective July 1, 1966
Policy No. 96C-2004
Endorsement No.
Named Insured Jim Robbins Company

The Aetna Casualty & Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut
John A. Hill
President.

EXHIBIT C

UNITED STATES AIRCRAFT INSURANCE GROUP
110 William St., N.Y., N.Y. 10038

COMPENSATION EXTENSION SCHEDULE

to be attached to and form part of Policy No. 960-2004 issued by the Aetna Casualty & Surety Company of Hartford, Connecticut in favor of Jim Robbins Company.

CLASSIFICATION OF OPERATIONS	Code No.	Estimated Total Annual Remuneration	Rate per $100 of Remuneration	Estimated Premium
Aircraft Operation—sales or service; agencies; taxi or sightseeing; student instruction:				
All members of flying crew	7422			
Aircraft Operation—irregular or non-scheduled airlines:				
All members of flying crew	7431			
Aircraft Operation—dusting or spraying, seeding, herding or scintollometer surveying:				
All members of flying crew	7420			
Aircraft Operation—patrol, photography other than mapping or survey work:				
All members of flying crew	7418			
Aircraft Operation—transportation of personnel in conduct of employer's business—all members of flying crew	7421			
Airport Operators—all employees including drivers	7423			
Aircraft Operation—helicopters				
All members of flying crew	7425			
Aircraft Operation N.O.C.				
All members of flying crew	7422	75,000.00	3.13	2,348.00
All other employees including drivers	7423	111,500.00	2.17	2,420.00
Clerical Office Employees N. O. C.	8810	16,800.00	.11	18.00
Loss Constant				15.00
(Bill Premium 50% for Quarterly Audit)				
ATTACHED TO ORIGINAL POLICY				
All States Endorsement				
Statutory Provision End.—Michigan				

EXHIBIT D

Declarations

STANDARD WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY

Item 1. PEC 111136

Name of Insured—Jim Robbins Company, Jim Robbins Seat Belt Company, Jebbco Corporation, Robbins Land Company, Robbins Realty Company.

Locations: All usual workplaces of the insured at or from which operations covered by this Policy are conducted are located at the above address unless otherwise stated herein:

Producer—Allied Underwriters, Inc.

Code No. 111136

em 2. Policy Period. From 7/1/66 to 7/1/67

em 3. Coverage of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states:
Michigan.

em 4. Classification of Operations
ntries in this item, except as specifically provided elsewhere in this policy, not modify any of the other provisions of this policy.

	Code No.	Premium Basis Estimated Total Annual Remuneration	Rate Per $100 of Remuneration	Estimated Annual Premiums
ardware Mfg. N.O.C.	3196	3,673,200.	2.12	77,871.84
ubs—country, golf, fishing or yacht-ing including clerical	9050	144,000.	2.09	3,009.60
erical Office Employees N.O.C.	8810	1,300,000.	.11	1,430.00
astic-Molded Products Mfg.—N.O.C.	4454	1,344,000.	3.01	40,454.40
ore Risks—retail—N.O.C.	8017	60,000.	.80	492.00
achine Shops—N.O.C.	3632	84,000.	2.25	1,890.00
hauffeurs, Drivers, and their helpers N.O.C. Commercial—including garage employees	7380	48,000.	1.97	945.60
				125,093.44
xperience Modification				x .99
				124,882.51
remium Discount				17,975.88
				106,856.65
		Total Estimated Annual Premium		$106,856.65
		Deposit Premium		$ 13,891.36

indicated herein, interim adjustments premium shall be made:

Minimum Premium $100.00
☐ Semi-Annually ☐ Quarterly [x] Monthly

umbers of endorsement forming a part this policy on its effective date: ???-235

em 5. Limit of Liability for Coverage B—Employers' Liability: $25,000.00, subject to all terms of this policy having reference thereto.

ANSWER OF DEFENDANT AETNA CASUALTY & SURETY COMPANY

(Filed July 10, 1968)

Now comes Aetna Casualty & Surety Company, by its attorneys, Lacey & Jones and in answer to the complaint for declaratory judgment says:

1. In regard to the allegations in paragraph one of the complaint this defendant neither admits nor denies but leaves plaintiff to its proofs.

2. The allegations of paragraph two are admitted.

3. The allegations of paragraph three are admitted.

4. The allegations in paragraph four are admitted.

5. Answering the allegations in paragraph five this defendant admits that Sheila Scarratt, Andrew Scarratt, Paul Scarratt, Christie Scarratt, Vicky Scarratt and Adelene H. Curry are nominal defendants. It denies that any of these people may be entitled to the benefits of the Workmen's Compensation Laws of the State of Michigan. Answering further this defendant agrees that the foregoing parties need not incur expenses of litigation and need not appear and believes that their rights will not be jeopardized by the proceedings in this matter. This defendant denies that following judgment in this cause the foregoing defendants will receive the full benefits under the Workmen's Compensation Act, as this defendant does not know whether or not any of the above mentioned defendants will be entitled to any Workmen's Compensation benefits. Answering further this defendant admits that the plaintiff is presently paying Workmen's Compensation benefits voluntarily but neither admits nor denies that such payments are due pursuant to the provision of the Workmen's Compensation Act.

6. The allegations of paragraph six are admitted.

7. Answering the allegations of paragraph seven this defendant says that the allegations contained therein are conclusions of law and denies that the parties hereto are without adequate relief except by the decision of this Court.

8. The allegations of paragraph eight are admitted.

9. Defendant Aetna Casualty & Surety Company admits that they issued a Workmen's Compensation policy to the Jim Robbins Company covering the period July 1, 1965 to July 1, 1966.

10. Answering paragraph ten Aetna Casualty & Surety Company admits that they issued a policy number 96C-2004 effective July 1, 1966, and expiring July 1, 1967. A copy of said policy and its coverage are attached hereto and made a part hereof and marked Exhibit A.

11. Answering paragraph eleven, Aetna Casualty & Surety Company neither admits nor denies that the Pacific Employers Insurance Company issued a Workmen's Compensation Policy to Jim Robbins Company for the period July 1, 1966 to July 1, 1967, as it does not have sufficient information to plead in this regard. Answering further Aetna Casualty & Surety Company says that Insurance Company of North America filed with the Workmen's Compensation Department a Notice of Coverage for the Jim Robbins Company for the period July 1, 1966 to July 1, 1967, said policy being policy number PEC 111136.

12. Answering paragraph twelve Aetna Casualty & Surety Company denies the allegations contained therein and alleges the truth to be that the soliciting agent of both said policies, one Henry Hollister an agent for both Insurance Company of North America and Aetna Casualty & Surety Company requested that policy number 96C-2004

of Aetna Casualty & Surety Company and policy number PEC 111136 of Insurance Company of North America both be issued, said request being because of his mistaken assumption as to the law that various divisions of a corporation could be insured by separate policies of Workmen's Compensation insurance issued by separate companies.

13. Answering paragraph thirteen Aetna Casualty & Surety Company deny the allegations contained therein allege the truth to be that said policies were issued in the form and manner reported by Aetna Casualty & Surety Company and Insurance Company of North America to the Workmen's Compensation Department because of the mistake of law of the said Henry Hollister. That prior to July 1, 1966, Aetna Casualty & Surety Company issued a policy of insurance to a company known as Commander Aviation, Inc., a Michigan corporation. That during the period of said policy all of the assets and all of the liabilities of Commander Aviation, Inc., were transferred to defendant Jim Robbins Company and the said Commander Aviation, Inc., was dissolved on January 18, 1966. That when said policy number 96C-2004 was issued to the Jim Robbins Company it was the intention of the said Henry Hollister, and the intention of his principals Insurance Company of North America and Aetna Casualty & Surety Company that said policy cover the operation formerly known as Commander Aviation, Inc.

14. Answering paragraph fourteen Aetna Casualty & Surety Company neither admits nor denies the allegations contained therein but for want of sufficient information leaves the plaintiff to its proofs.

15. Answering paragraph fifteen Aetna Casualty &

Surety Company neither admits nor denies the allegations contained therein but for want of sufficient information leaves the plaintiff to its proofs.

16. That Aetna Casualty & Surety Company neither admits nor denies the allegations contained therein but for want of sufficient information leaves the plaintiff to its proofs.

17. Answering paragraph seventeen Aetna Casualty & Surety Company neither admits nor denies the allegations contained therein but for want of sufficient information leaves the plaintiff to its proofs.

18. Answering paragraph eighteen for want of sufficient information Aetna Casualty & Surety Company neither admits nor denies that the plane flight involved was a return flight from South Dakota to Detroit, Michigan but does admit that shortly after take off a crash occurred resulting in the death of Geoffrey G. Scarratt and Clair W. Curry.

19. Answering paragraph nineteen Aetna Casualty & Surety Company denies that any payments made by Insurance Company of North America or any Subsidiary were made in error, and further alleges that the claim of the plaintiff does not relate to any obligation to the dependents of Geoffrey G. Scarratt and Clare W. Curry as it has not yet been determined that there is an obligation under the Workmen's Compensation Law owed to the dependents of the said Scarratt and Curry by the Michigan Workmen's Compensation Department, or by the Michigan Workmen's Compensation Appeal Board, the only agencies authorized to come to such determination by the provisions of the Michigan Workmen's Compensation Act.

AFFIRMATIVE RELIEF

Now comes Aetna Casualty & Surety Company, by its attorneys, Lacey & Jones, and by way of affirmative relief to the complaint of Pacific Employers Insurance Company says:

1. That from July 1, 1965, and at all times pertinent hereto Henry Hollister was an agent of Aetna Casualty & Surety Company and the Insurance Company of North America authorized to solicit and issue policies of Workmen's Compensation for both said insurance companies.

2. That for several years prior to July 1, 1966, the said Henry Hollister solicited the insurance business of the various Jim Robbins Enterprises and was successful in obtaining, among other business, the placing of all of the Workmen's Compensation policies for the Jim Robbins Enterprises with the Aetna Casualty & Surety Company.

3. That said Workmen's Compensation coverage was afforded by the Aetna Casualty & Surety Company in two policies, one policy written for Commander Aviation, Inc., a Michigan corporation, and the other policy written for all of the other Jim Robbins Enterprises except Commander Aviation, Inc.

4. That prior to July 1, 1966, Aetna Casualty & Surety Company issued the policy covering Commander Aviation, Inc., through the facilities of the United States Aviation Underwriters, Inc.

5. That prior to July 1, 1966, Aetna Casualty & Surety Company advised the said Henry Hollister that it did not wish to renew the Workmen's Compensation policy for the Jim Robbins Enterprises.

6. That on or about January 18, 1966, all of the assets and all of the liabilities of the said Commander Aviation,

Inc., were taken by the Jim Robbins Company and the said Commander Aviation, Inc., was dissolved as a corporation.

7. That because of his mistaken understanding of the law the said Henry Hollister continued to place the Workmen's Compensation coverage with regard to the activities of the Jim Robbins Company formerly performed by Commander Aviation, Inc., with Aetna Casualty & Surety Company through the services of the United States Aviation Underwriters, Inc. That because of his misunderstanding as to the law the said Henry Hollister placed the remainder of the said Workmen's Compensation coverage with regard to the Jim Robbins Company with the Insurance Company of North America.

8. That the premiums received by Aetna Casualty & Surety Company were based solely upon the payrolls and the risk involved with regard to employees employed in the activity previously conducted by Commander Aviation, Inc., and the premiums received by Insurance Company of North America were based upon the risk and business and employees of all of the other Jim Robbins Enterprises.

Wherefore, Aetna Casualty & Surety Company prays that because of the mistake of law of the agent of both Aetna Casualty & Surety Company and Insurance Company of North America, the policies issued by said companies to the said Jim Robbins be reformed to meet the intent of the parties and an order be entered that is appropriate to equity and good conscience.

Wherefore, Aetna Casualty & Surety Company prays that the complaint of the plaintiff be dismissed, and a judgment entered denying the plaintiff any relief, or in the alternative that the policies of insurance issued to the

Jim Robbins Company by Aetna Casualty & Surety Company and Insurance Company of North America covering the Workmen's Compensation obligation for the period July 1, 1966 to July 1, 1967, be reformed in accordance with the intent of the parties and appropriate to equity and good conscience.

Lacey & Jones
By: E. R. Whinham, Jr.
Attorneys for Defendant, Aetna Casualty & Surety Company
1204 Commonwealth Building
Detroit, Michigan 48226

MOTION FOR SUMMARY JUDGMENT

(Filed August 12, 1968)

Now comes the Pacific Employers Insurance Company, by Alexander, Buchanan & Conklin, its Attorneys and moves pursuant to Rule 56 for a Summary Judgment for the reason that the sole issue before the Court is one of law between the Pacific Employers Insurance Company, a California Corporation, plaintiff, and the Aetna Casualty & Surety Company, a Connecticut Corporation, one of the defendants.

In support of this motion the Pacific Employers Insurance Company states:

1. That Henry Hollister for a great many years was engaged in the insurance business and acted as Insurance Counsel for Jim Robbins Company and associated companies.

2. That the agent, Henry Hollister, was aware of the Michigan statutory language or chargeable with the knowl-

edge pertaining to the obligation of an employer to insure all its business in one Workmen's Compensation Company as provided by Section 1, Part IV of the Workmen's Compensation Act, M.S.A. 17.195.

3. That in attempfing to place coverage for and on behalf of his clients, the said Henry Hollister determined that an express agreement and with the intent of the insurers to limit their obligations under the respective policies to the respective classifications named and that insurers and agent were all aware of the statutory requirement of Section 1, Part IV of the Workmen's Compensation Act, Compiled Laws, 1948 §414:1 M.S.A. §17.195.

4. That on September 26, 1966 an airplane crash occurred taking the lives of Geoffrey Scarratt and Clair W. Curry and by reason thereof the Pacific Employers Insurance Company voluntarily commenced payment of Workmen's Compensation benefits to the dependents of the deceased.

5. That Fern Duvall representing The Aetna Casualty & Surety Company as Workmen's Compensation Claims Manager, agreed with Richard Copeland, Workmen's Compensation Supervisor of the Pacific Employers Insurance Company that the dependents of the deceased persons would be nominal defendants, need not incur any expense, and that upon the determination by the Court of the insurer on the risk that the dependents of the deceased persons would have an action before the Workmen's Compensation Department for benefits under the Workmen's Compensation law against the insurer if plaintiffs in the Workmen's Compensation action or actions were able to sustain proofs of their case.

6. That if the Aetna Casualty & Surety Company is

found to be the insurer, reimbursement would be made to the Pacific Employers Insurance Company for advances made to date of final decision.

7. That the plaintiff is in agreement that the Workmen's Compensation Commission has sole jurisdiction to determine the rights of the employees for compensation against employers arising out of accidents (Workmen's Compensation Act, Section 6, Part III, Compiled Laws, 1948 §413.6 M.S.A. 17.180).

8. That if both widows and defendants are entitled to the benefits of the Workmen's Compensation Law more than the Insurance Company of North America or its wholly owned subsidiary, the plaintiff, Pacific Employers Insurance Company would not write the aviation liability under the Workmen's Compensation Law of Jim Robbins Company and affiliated companies.

9. That the said Henry Hollister learned that The Aetna Casualty & Surety Company would not write the entire Workmen's Compensation obligation of Jim Robbins Company and associates but would write the Workmen's Compensation coverage limited to aviation accidents.

10. That the Agent, Henry Hollister, with the express understanding of both insurers and the intent of both insurers caused to be issued simultaneously the two Workmen's Compensation policies with endorsements thereon covering the classifications that each insurer was to cover, that being The Aetna Casualty & Surety Company limiting its obligation to aviation accidents and the Pacific Employers Insurance Company assuming the obligation of all other types of accidents under the Workmen's Compensation Law but omitting from its classification aviation accidents.

11. That as set forth in the prayer for relief in the Declaratory Judgment action the plaintiff represents to the Court that the sole controversy is an issue of law for the Court to determine by virtue of the simultaneous issue of the two Workmen's Compensation policies; the accidents arising out of an aviation occurrence; the knowledge of the insurers and the agent of the law; and the intent of all parties as evidenced by the Affidavits attached hereto and made a part hereof.

Wherefore, the Plaintiff prays that its Motion for a Summary Judgment be granted and that an order be entered determining that The Aetna Casualty & Surety Company pursuant to the intent of the parties, the issuance of its contract, and the classification of obligations therein stated was on September 26, 1966 the Workmen's Compensation carrier and liable for any judgments that may be rendered by the Workmen's Compensation Commission pursuant to the terms of the Workmen's Compensation Act and that The Aetna Casualty & Surety Company be required, if liability is established by the dependents against the Aetna Casualty & Surety Company to reimburse the plaintiff for the payments made to the date of final decision of the litigation.

This Motion will be brought on for hearing before the Honorable Talbot Smith, District Judge on Monday, August 19, 1968 at 9:30 A.M. or as soon thereafter as counsel may be heard.

Alexander, Buchanan & Conklin
By: G. Cameron Buchanan
Attorneys for Plaintiff
2217 First National Building
Detroit, Michigan 48226

Dated: August 7, 1968

AFFIDAVIT

State of Michigan,
County of Wayne—ss.

G. Cameron Buchanan being first duly sworn, deposes and says that he is a member of the firm of Alexander, Buchanan & Conklin, and has principal charge of the action of the plaintiff, Pacific Employers Insurance Company, a California Corporation, in the entitled cause;

That at a conference with Richard J. Copeland, Fern Duvall, and E. R. Whinham, Jr. it was agreed that the Pacific Employers Insurance Company, a California Corporation, would institute a Declaratory Judgment action in the United States District Court.

That the controversy would extend between the two insurers and that the other parties were nominal parties and that under no circumstances would the dependents of the deceased persons be obligated to incur any legal expense.

Affiant further states that E. R. Whinham, Jr. in accordance with the agreement of his employer, Fern Duvall, made at the same time, agreed that in the event The Aetna Casualty & Surety Company was held to be the insurer that the Pacific Employers Insurance Company would be relieved of any obligation.

Affiant further states that E. R. Whinham, Jr. was unwilling to concede that the United States District Court had any jurisdiction over the obligation of any one pertaining to payment of Workmen's Compensation benefits to the defendants claiming, and rightfully so, that the sole jurisdiction pertaining to Workmen's Compensation obligations rested with the Workmen's Compensation Commission.

That affiant if called as a witness would testify as to the

information set forth herein and in the Affidavit of Richard J. Copeland.

Further affiant sayeth not.

G. Cameron Buchanan

Subscribed and sworn to before me the 7th day of August, 1968.

Anah Bangh,
Notary Public, Oakland County, Michigan.
Acting in Wayne County.
My commission expires February 9, 1969.

AFFIDAVIT

State of Michigan,
County of Wayne—ss.

Richard J. Copeland being first duly sworn, deposes and sas that he is Supervisor of the Workmen's Compensation Division of the Pacific Employers Insurance Company, a California Corporation.

That the Pacific Employers Insurance Company had prior to September 26, 1966 issued a Workmen's Compensation policy on Jim Robbins Company and affiliated companies omitting by endorsement in its classification of coverage accidents arising out of the operation of aircraft.

That an accident in South Dakota occurred on September 26, 1966 in which Geoffrey Scarratt and Clair W. Curry sustained fatal injuries leaving dependents.

That without an adjudication Pacific Employers Insurance Company voluntarily agreed to pay Workmen's Compensation benefits.

That Fern Duvall, Supervisor of the Workmen's Compensation Division of The Aetna Casualty & Surety Company for and on behalf of that Company agreed with affiant that if subsequent litigation disclosed that the obligation of payment of Workmen's Compensation to the dependents of Scarratt and Curry was that of the Aetna Casualty & Surety Company that that Company would assume future payments and reimburse the Pacific Employers Insurance Company for payments made to date.

Affiant further states that Fern Duvall stated to affiant in the presence of others that he and his Company were well aware of the classification disclosed on the contract issued by the Aetna Casualty & Surety Company, the limitations attempted to be placed thereon, and further that the Pacific Employers Insurance Company has issued simultaneously with the issuance of the Aetna Casualty & Surety Company policy a Workmen's Compensation policy covering all risks other than those pertaining to aviation accidents.

Further affiant sayeth not.

That if called as a witness affiant would testify in accordance with the information herein contained.

Richard J. Copeland

Subscribed and sworn to before me this 8th day of August, 1968.

A. Ross MacEwen,
Notary Public, Wayne County, Michigan.
My commission expires June 21, 1970.